

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Illinois Public Telecommunications Association,	)	
an Illinois not for profit corporation	)	
	)	Docket No. 15-0254
Petition to determine whether Illinois local	)	
exchange carriers are in compliance with the	)	
Illinois Public Utilities Act and Section 276 of	)	
the Communications Act of 1934.	)	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S  
MOTION TO DISMISS PETITION

NOW COMES the Staff of the Illinois Commerce Commission, by its undersigned counsel, and, pursuant to Section 200.190 of the Commission's Rules, moves to dismiss the above captioned proceeding, and in support thereof, states as follows:

1. On April 1, 2015, the Illinois Public Telecommunications Association (IPTA), a not-for-profit corporation representing independent payphone providers (IPPs), filed its Petition seeking an order directing the Illinois Bell Telephone Company (AT&T) to refund to the IPTA, with interest, rates charged by AT&T to IPTA members between April 15, 1997 and December 13, 2003 that were in excess of cost-based rates prescribed by Section 276 of the federal Telecommunications Act of 1996. *See, generally, Petition*. In the alternative, IPTA requests that Commission Docket No. 98-0195 be reopened for the same purpose. *Id.*

2. By way of background, this is by no means the first time this matter has been before the Commission, the Federal Communications Commission (FCC) or the courts. The Commission considered, and rejected IPTA's request for refunds in its 2003 Payphone Order. *See Interim Order, Illinois Commerce Commission On its Own Motion: Investigation Into Certain Payphone Issues as Directed in Docket 97-0225*, ICC Docket

No. 98-0195 (November 12, 2003) (hereafter “2003 Payphone Order”). There, the Commission found that the rates subsequently found to be in excess of those prescribed by Section 276 had been approved by the Commission at least twice, were tariffed, were rates to which IPTA had previously concurred in a settlement,<sup>1</sup> and had not been the subject of a formal complaint by IPTA. 2003 Payphone Order, 42-43. The Commission further noted that IPTA had enjoyed “deep discounts” for the eight years prior to the adoption of the 2003 Payphone Order as a result of the settlement noted above. Id. Finally, the Commission noted that the delay in implementing cost-based, Section 276-compliant rates was in no small part due to IPTA’s dilatory pursuit of the matter, observing that IPTA had filed its direct testimony in the proceeding nearly six months late. Id., 43 n.16. The Commission therefore rejected IPTA’s request for refunds. Id., 43

3. The Illinois Appellate court affirmed the Commission’s decision. See *Opinion*, Case No 1-04-0225 (November 23, 2005).<sup>2</sup> There, the Appellate Court found that, since the rates in effect prior to November 12, 2003 were Commission-approved rates, they were lawfully in effect, AT&T was entitled to rely on them, and IPTA therefore did not have a right of action to recover the difference between the old and new rates. Opinion, 8. The Appellate Court further found, in rejecting an IPTA argument that Section 276 preempted the approved rates, that: “the FCC looked to state regulatory Commissions to ensure compliance with the FCC’s regulations.” Id., 9. The Appellate

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<sup>1</sup> The IPTA and AT&T jointly stipulated, subject to approval by the ICC, which granted such approval, to agreed-upon payphone rates which were significantly discounted. *Order*, 5,6, 52-54, Independent Coin Payphone Association and Total Communication Services, Inc. -vs- Illinois Bell Telephone Company: Complaint to reclassify Illinois Bell Telephone Company pay telephone services as a competitive service in Illinois Market, ICC Docket No. 88-0412, 1995 Ill. PUC Lexis© 393 (June 7, 1995). Accordingly, AT&T had ICC-approved rates in effect at all times relevant to this controversy. IPTA’s assertion that these rates were somehow not the “lawful” rates is therefore entirely without merit.

<sup>2</sup> Reported affirmed, IPTA v. Commerce Comm’n, 361 Ill. App. 3d 1081 (2005).

Court concluded that: “the existing rates remained in effect until the ICC determined whether ... they complied with the FCC’s regulations.” Id.

4. The Illinois Supreme Court denied IPTA’s Petition for Leave to Appeal the Appellate Court’s decision. IPTA v. Commerce Comm’n, 219 Ill. 2d 565 (2006). The U.S. Supreme Court denied IPTA’s Petition for Writ of Certiorari. IPTA v. Commerce Comm’n, 549 U.S. 1205 (2007).

5. In the interim, IPTA filed a petition before the FCC seeking preemption of the Commission’s order denying refunds. The FCC declined to preempt the Commission’s order, stating that:

We deny the IPTA ... petition[.]. ... [S]ection 276 states that “to the extent that any State requirements are inconsistent with the Commission’s regulations, the Commission’s regulations on such matters shall preempt such State requirements.” [fn] Because we conclude that the requirements in the state commission decisions before us [including Illinois’] are not inconsistent with the Commission’s regulations, we do not preempt those decisions.

Declaratory Ruling and Order, ¶37, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 / Illinois Public Telecommunications Association’s Petition for a Declaratory Ruling Regarding the Remedies Available for Violations of the Commission’s Payphone Orders, 28 FCC Rcd. 2615, 28 F.C.C.R. 2615 (rel. February 28, 2013) (FCC Payphone Order) (footnote omitted)

6. In so finding, the FCC determined that the Commission “followed the [FCC]’s orders and fulfilled the duties with which the Commission charged them...[.]” FCC Payphone Order, ¶40. The FCC observed that: “in deciding whether to award refunds, the state commissions properly looked to applicable state and federal law and regulations, and decided, for reasons specific to each state’s analysis, not to order refunds. In Illinois, the ICC based its rejection of refunds on the Illinois filed tariff doctrine

and the IPTA's failure to file a formal complaint." Id., ¶41. The FCC concluded that: "denying refunds in those cases where the [IPP]s did not exercise their rights on a timely basis, failed to exhaust their administrative remedies, or otherwise failed to show they were legally entitled to refunds is in no way inconsistent with [FCC Orders]." Id., ¶46.

7. The FCC rejected the IPTA's argument that Section 276 afforded it an absolute right to refunds. Id., ¶41.

8. Finally, the FCC stated that:

Refund determinations should be made by the various state commissions based on the specific facts of the case before them. We recognize that each individual proceeding involves its own unique set of facts, procedural postures, and relevant state and federal statutes. With regard to similar proceedings and consistent with our previous direction to the states regarding their administration of intrastate payphone rates pursuant to section 276, we therefore leave to the states the responsibility for deciding whether refunds are appropriate. [fn] Because we conclude that the refund issue may properly be adjudicated by the states, we do not reach other issues raised by the parties, and find that those issues also may be considered by the states in their proceedings.

Id., ¶49 (footnote omitted)

9. The IPTA appealed from the FCC's decision. The U.S. District Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision, ruling that: (a) Section 276 does not afford an absolute right to refunds; (b) that the FCC's decision not to preempt the Commission's 2003 Payphone Order denying refunds was proper, in that the Commission's 2003 Payphone Order was not inconsistent with Section 276; and (c) the FCC's decision was not arbitrary and capricious. IPTA v. FCC, 752 F. 3d 1018, 1023-1025 (D.C. Cir. 2014). In so ruling, the Court of Appeals found that:

[T]he fact that states *may* order refunds does not mean that states *must* order refunds. Therefore, a state commission or state court decision that considers a Section 276 claim and denies refunds—as happened in the three states at issue here—is not inconsistent with the FCC's regulations

and is not preempted.

IPTA v. FCC, 752 F. 3d at 1023 (emphasis in original)

10. The U.S. Supreme Court denied IPTA's Petition for Writ of Certiorari. IPTA v. FCC, -- U.S. --; 135 S. Ct. 1583 (2015).

11. The IPTA is now before the Commission, seeking relief that has been denied it by the Commission, FCC, Illinois Appellate Court, Illinois Supreme Court, U.S. District Court of Appeals, and twice by the U.S. Supreme Court.

12. The Commission should deny such relief, for the second time.

13. It should be clear that the IPTA seeks from the Commission an order requiring refunds, despite the fact that the rates in question were, at all times, lawfully in effect. To do so would violate state law, specifically Section 9-240 of the Act, which provides that:

Except as in this Act otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for ... any service rendered or to be rendered, than the rates or other charges applicable to such ... service as specified in its schedules on file and in effect at the time, except as provided in Section 9-104, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates or other charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons.

220 ILCS 5/9-240 (emphasis added)

14. The Commission or an Illinois court might conceivably be in a position to order such relief – in violation of Illinois statute - had the Commission's 2003 Payphone Order been preempted by the FCC, the U.S. District Court of Appeals, or the U.S. Supreme Court. However, the FCC and Court of Appeals both specifically and explicitly declined to preempt the Commission's 2003 Payphone Order, and the U.S. Supreme

Court declined to hear the matter at all. Thus, IPTA's position, reduced to its essence, is this: the Commission should reconsider and reverse a decision (which has been affirmed by no fewer than five reviewing courts and agencies), in a manner that violates State law. The Commission, as a creature of State law, should not do this.

15. As noted above, neither the FCC nor U.S. District Court specifically direct the Commission to reconsider its decision, although the FCC suggests that "states", generically, might, if they choose to. This, however, does not rise to the level of a mandate the Commission is required to follow. Further, the FCC's suggestion that some "states" might do so is scarcely a reason to violate a clear and unambiguous state law.

16. Accordingly, the IPTA's Petition fails to state a claim upon which relief can be based, as the Commission is specifically barred by State law from issuing refunds where the rates in question were, as here, Commission-approved. Further, as noted above, matters at issue in the IPTA's Petition have been (at the very least) fully litigated, and the refund issue has conclusively been resolved against IPTA. This certainly constitutes grounds for IPTA's claim being: "barred by [an]other affirmative matter avoiding the legal effect of or defeating the claim[.]" 735 ILCS 5/2-619(a)(9).

17. Finally, the equities do not favor IPTA. As noted above, and as the Commission found, IPTA benefitted from lower rates than those to which it was otherwise entitled for an eight-year period, based on a Commission-approved agreement with AT&T. Further, as the Commission found, IPTA pursued its claim in a dilatory manner, such that the extended lapse of time between the enactment of Section 276 and the implementation of Section 276-compliant rates in Illinois is largely attributable to it.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that the Petition be dismissed with prejudice.

Respectfully submitted,

/s/ \_\_\_\_\_

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